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| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | NINTH JUDICIAL CIRCUIT |
| COUNTY OF CHARLESTON | ) | C/A No. 2015-CP-10-3891 |
| Athan Fokas, | ) | |
| | ) | ORDER GRANTING DEFENDANTS' |
| Plaintiff, | ) | MOTION FOR SUMMARY JUDGMENT |
| | ) | PURSUANT TO SCRCP RULE 56 |
| vs. | ) | |
| | ) | |
| Phillip Ferderigos and Spiros Ferderigos, | ) | |
| | ) | |
| Defendants. | ) | |



THIS MATTER came before me for a hearing on Defendants Spiros and Phillip Ferderigos' Motions for Summary Judgment on December 11, 2017. Each of the Defendants filed their own Motion for Summary Judgment. Present in the Court were the following: Plaintiff Athan Fokas and his attorney Leslie Lenhardt, Esquire; Defendant Phillip Ferderigos and his attorneys Jennifer Thiem, Esquire, and Laura Robinson, Esquire; and Defendant Spiros Ferderigos and his attorneys M. Dawes Cooke, Jr., Esquire, and Stephanie Anthony, Esquire.

## A. BACKGROUND

In his initial Complaint, Plaintiff alleged "Defendants communicated [defamatory] statements to their father ... [and] Plaintiff has been confronted with said statements by his mother ... who has identified them as the source of said statements." However, contrary to the allegations, Plaintiff's mother Irene Fokas submitted an affidavit and provided deposition testimony denying such allegations, which were the basis of the Plaintiff's original complaint. Thereafter, Plaintiff amended his Complaint to allege Defendants defamed Plaintiff by publishing alleged defamatory statements directly to Plaintiff's attorney, Stan Barnett[1]. Plaintiff further alleged it was his belief Defendants published the aforementioned defamatory statements to Plaintiff's sister Rania

[1] The record reveals that such alleged statements were allegedly made in a private meeting requested by Plaintiff's attorney to discuss possible resolution to threatened litigation by Plaintiff against Defendants.

Nikatos, who in turn repeated these statements to her mother (who is also Plaintiff's mother) Irene Fokas, who then repeated these statements to Plaintiff.

Specifically, in his Amended Complaint, Plaintiff alleges claims for defamation against Defendants for allegedly making the following statements regarding Plaintiff: "(a) Hiring someone to set fire to the second floor of the building at 229 King Street for the purpose of collecting insurance proceeds; (b) Falsely claiming in an insurance claim that he had been injured working in the restaurant business operated on the first floor of said building when he had, in fact, been injured in ways not related to the business, all for the purpose of collecting insurance proceeds; (c) Falsely claiming damages to the building at 229 King Street were from a hurricane in 1998, when they were not." Plaintiff further alleged Defendants described Plaintiff as "dishonest and capable of doing anything for money."

The record is clear that, in the light most favorable to Plaintiff, there is no genuine issue of material fact and there is not a scintilla of evidence to support Plaintiff's allegation that Defendants published any unprivileged defamatory statement(s) to any third party about him. To the contrary, the record is clear Defendants never made any defamatory statement(s) to Plaintiff's sister Rania Nikatos regarding Plaintiff. Further, Plaintiff's mother Irene Fokas admitted under oath that she merely "guessed" and "figured" that the source of the alleged defamatory statement(s) was from Defendants. Defendants also presented sworn testimony from Plaintiff's own brother-in-law, Gerasimos Nikatos, that he (Gerasimos Nikatos) was the one who informed his wife Rania Nikatos (who is also Plaintiff's sister) about Plaintiff asking someone to set the fire at 229 King Street. Lastly, the record is clear that any alleged statement(s) published by either Defendant to Plaintiff's attorney Stan Barnett does not support a claim of defamation because Plaintiff's attorney is

Plaintiff's agent, who does not constitute a third party, and, in addition, any alleged statements to Plaintiff's attorney are privileged and/or were otherwise invited by Plaintiff's attorney.

**B. STANDARD OF REVIEW**

"Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law." Rule 56(c), SCRCP; Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). Rule 56(c), SCRCP, provides that a trial court may grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP.

In determining whether a genuine issue of fact exists, the evidence and all reasonable inferences drawn from it must be viewed in the light most favorable to the non-moving party. Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003). "Under Rule 56(c), the party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact." Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). This initial responsibility may be discharged by pointing out to the trial court that there is an absence of evidence to support the non-moving party's case, and it is not necessary for the moving party to support its motion with affidavits or other similar materials negating the opponent's claim. Id.

"Once the moving party carries its initial burden, the opposing party must come forward with specific facts that show there is a genuine issue of fact remaining for trial." Sides v. Greenville Hosp. Sys., 362 S.C. 250, 255, 607 S.E.2d 362, 364 (Ct. App. 2004). "When a plaintiff is faced with a defendant's motion for summary judgment that is supported by evidence, the

plaintiff cannot defeat the motion by relying upon the mere allegations of his complaint, but must disclose the facts he intends to rely on by affidavit or other proof." Shupe v. Settle, 315 S.C. 510, 516, 445 S.E.2d 651, 655 (Ct. App. 1994); Dyer v. Moss, 284 S.C. 208, 325 S.E.2d 69 (Ct. App. 1985). "A conclusory statement as to the ultimate issue in a case is not sufficient to create a genuine issue of fact for purposes of resisting summary judgment." Shupe, 315 S.C. at 516-17, 445 S.E.2d at 655; Germann v. New York Life Ins. Co., 286 S.C. 34, 331 S.E.2d 385 (Ct. App. 1985).

**C. DEFAMATION JURISPRUDENCE**

Under South Carolina law, "[t]he tort of defamation permits a plaintiff to recover for an injury to his reputation caused by the false statements of another." Banks v. St. Matthew Baptist Church, 406 S.C. 156, 161, 750 S.E.2d 605, 607 (2013). To prove defamation, a plaintiff must show "(1) a false and defamatory statement was made; (2) the unprivileged publication was made to a third party; (3) the publisher was at fault; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication." Erickson v. Jones St. Publishers, LLC, 368 S.C. 444, 464, 629 S.E.2d 653, 664 (2006). "A communication is defamatory if it tends to impeach the honesty, integrity, virtue, or reputation...." Hubbard and Felix, The South Carolina Law of Torts 462 (2d ed. 1997).

"Defamatory communications take two forms: libel and slander." Erickson, 368 S.C. at 466, 629 S.E.2d at 664. "Slander is a spoken defamation while libel is a written defamation or one accomplished by actions or conduct." Id. "[A] statement may be actionable *per se,* in which case the defendant is presumed to have acted with common law malice and the plaintiff is presumed to have suffered general damages." Id. Under the common law, slander is actionable *per se* only when it charges the plaintiff with one of five types of acts or characteristics: (1) commission of a

crime of moral turpitude; (2) contraction of a loathsome disease; (3) adultery; (4) unchastity; or (5) unfitness in one's business or profession. Holtzscheiter v. Thomson Newspapers, Inc., 332 S.C. 502, 511 n.5, 506 S.E.2d 497, 502 n.5 (1998). "Or a statement may be not actionable *per se,* in which case nothing is presumed and the plaintiff must plead and prove both common law malice and special damages." Erickson, 368 S.C. at 465, 629 S.E.2d at 664. Common law malice means the defendant acted with ill will toward the plaintiff or acted recklessly or wantonly, *i.e.,* with a conscious disregard of the plaintiff's rights. Padgett v. Sun News, 278 S.C. 26, 32, 292 S.E.2d 30, 34 (1982). "The determination of whether or not a statement is actionable *per se* is a matter of law for the court to resolve." Erickson, 368 S.C. at 466, 629 S.E.2d at 665.

In South Carolina, "[a] person makes a defamatory statement if the statement 'tends to harm the reputation of another as to lower him in the estimation of the community or deter third persons from associating or dealing with him.'" Fountain v. First Reliance Bank, 398 S.C. 434, 441, 730 S.E.2d 305, 309 (2012) (citing Fleming v. Rose, 350 S.C. 488, 494, 567 S.E.2d 860, 860 (2002)). The tort of defamation permits "a plaintiff to recover for injury to his or her reputation as the result of the defendant's communications to others of a false message about the plaintiff." Erickson v. Jones St. Publishers, L.L.C., 368 S.C. 444, 464, 629 S.E.2d 653, 664 (2006). Moreover, in South Carolina, Plaintiff must set forth facts sufficient to allege that the statements were unprivileged, the specificity of the alleged false statements, and *to whom* the alleged false statements were published. See McNeil v. SCDOC, 404 S.C. 186, 189, 743 S.E.2d 843, 844 (Ct. App. 2013). Part of alleging publication is to allege that the defamatory statements were actually published to another person. Id.; See also Williams v. Lancaster County School District, 369 S.C.

293 (2006).[2] Furthermore, in Williams v. Lancaster County School District, supra, in considering the sufficiency of circumstantial evidence in a defamation action, the Court held that where there is evidence to support that numerous people could have been responsible for the alleged defamatory statements and the alleged defamatory statements cannot only be possibly attributable to Defendant(s), the Plaintiff's attempt to establish defamation with indirect circumstantial evidence fails.

Lastly, in South Carolina, "[t]he courts favor compromise; accordingly, evidence relating to settlements is generally not admissible to prove liability." Commerce Center of Greenville, Inc. v. W. Powers McElveen & Associates, Inc., 347 S.C. 545, 558, 556 S.E.2d 718, 726 (Ct. App. 2001); Rule 408, SCRE; Hunter v. Hyder, 236 S.C. 378, 114 S.E.2d 493 (1960). Rule 408, SCRE, provides as follows:

> **Evidence** of (1) furnishing or offering or promising to furnish, or (2) accepting or **offering or promising** to accept, a valuable **consideration** in compromising or attempting **to compromise** a claim which was disputed as to either validity or amount, **is not admissible to prove liability** for or invalidity of the claim or its amount. **Evidence of conduct or statements made in compromise negotiations is likewise not admissible.** This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution (emphasis added).

Rule 408, SCRE (emphasis added). "This rule contemplates that the parties need to feel free to make certain assumptions for the purpose of settlement negotiations and that those statements

[2] In Williams, a father and mother filed a defamation action against the school district alleging the principal was responsible for a rumor that father was having an affair. As the Court noted, numerous individuals had knowledge of the incident at issue between the father and a secretary at the school. Id. at 304, 631 S.E.2d at 292. The father testified he could not say "any employee of the District had said he was having any affair" with the secretary. Id. As a result, the Court held any number of people could be responsible for the rumor, and, as a result, the father could not establish any defamatory statement actually published by the principal. Id.

are assumed by the author to be true only for the purpose of compromise negotiations." Fesmire v. Digh, 385 S.C. 296, 308-09, 683 S.E.2d 803, 809 (Ct. App. 2009). "The rule codifies the longstanding principle that evidence of conduct or statements made in compromise negotiations is not admissible." Id.; see also QHG of Lake City, Inc. v. McCutcheon, 360 S.C. 196, 209, 600 S.E.2d 105, 111 (Ct. App. 2004). There has been a trend to extend the protection to all statements made in compromise negotiations. 2 McCormick on Evidence § 266 (6th ed. 2006). South Carolina courts have excluded evidence related to efforts to schedule meetings to discuss settlement negotiations, let alone the content of those settlement meetings.[3]

Further, in regard to defamation actions, South Carolina recognizes absolute judicial privilege for communications involving preliminary steps leading to any judicial action. "When a communication is absolutely privileged, no action lies for its publication, no matter what the circumstances under which it is published, i.e., an action will not lie even if the report is made with malice." See Pond Palace Partners, Inc. vs. Poole, 351 S.C. 1, 22, 567 S.E.2d 881, 892 (Ct. App. 2002); see also Crowell v. Herring, 301 S.C. 424, 430, 392 S.E.2d 464, 467 (Ct. App. 1990) (stating "Historically there has been a tendency to restrict the absolute privilege to judicial proceedings, legislative proceedings and acts of state ... This is so, ostensibly because when a communication is absolutely privileged, no action will lie for its publication ... This, however, does not answer the question of whether there is or has been a tendency to restrict the definition of 'judicial proceeding' to exclude preliminary steps leading up to a formal judicial proceeding

[3] For example, in Commerce Center of Greenville, a contractor in a construction litigation case attempted to enter into evidence two letters from plaintiff related to settlement negotiations. Commerce Center of Greenville, 347 S.C. at 553, 556 S.E.2d at 722. The letters concluded with plaintiff's attempts to schedule a meeting to discuss proposed repairs and to "see if a resolution can be reached...without the necessity of continued litigation." Id. at 558, 556 S.E.2d at 725. The Court of Appeals found that the letters related to actual settlement negotiations or a "settlement relationship between the parties" because "[t]hese letters reference an attempt to schedule a meeting to resolve the case" and "an attempt to curb further litigation." Id. The Court of Appeals held that the letters were properly excluded from evidence by the trial court. Id. at 559, 556 S.E.2d at 726.

... We hold the absolute privilege exists as to any utterance arising out of the judicial proceeding and having any reasonable relation to it, including preliminary steps leading to judicial action of any official nature provided those steps bear reasonable relation to it.").

## D. FINDINGS OF FACT AND CONLUSIONS OF LAW

Based upon careful review of the record, drawing all reasonable inferences in favor of the Plaintiff, I make the following findings of fact and conclusions of law:

I find that no genuine issue of material facts exists that Defendants published any defamatory statements to any third party concerning the Plaintiff.

### a. Rania Nikatos

No genuine issue of material fact exists and there is not a scintilla of evidence to support publication of any alleged defamatory statement(s) by Defendants to any third party, including Plaintiff's sister Rania Nikatos. The record is clear Defendants did not make any defamatory statement to Plaintiff's sister Rania Nikatos and the record is further clear Defendants were not the source of any alleged defamatory statement(s) Rania Nikatos may have heard regarding Plaintiff. To the contrary, Rania Nikatos submitted an affidavit and testified in her deposition that neither Defendant made any alleged defamatory statement(s) about Plaintiff to her. She further testified she has never heard from anyone that Defendants made any of the alleged defamatory statement(s) Plaintiff accuses them of making, and she testified she never told Irene Fokas (Rania and Plaintiff's mother) that Defendants made any alleged defamatory statement(s) about Plaintiff. [4]

[4] Further, Irene Fokas admits in her deposition testimony she never asked her daughter (Rania Nikatos) who the source of the alleged defamatory statements was, and Irene Fokas also admitted she merely "guessed" and "figured" the source was Defendants. Gerasimos Nikatos, however, attested in a sworn affidavit that it was he (Gerasimos) who informed Rania Nikatos about Plaintiff allegedly asking a contractor to set fire to the 229 King Street building.

In addition, the record is clear that Rania Nikatos' husband, Gerasimos Nikatos, submitted an affidavit asserting it was he (Gerasimos Nikatos) who informed Rania Nikatos that, sometime soon after the fire at 229 King Street, a contractor told him Plaintiff asked the contractor to set fire to 229 King Street. Gerasimos Nikatos further attested that he told his wife Rania Nikatos what the contractor told him.

**b. Irene Fokas**

No genuine issue of material fact exists and there is not a scintilla of evidence to support publication of any alleged defamatory statement(s) by Defendants to any third party, including Plaintiff's mother Irene Fokas. The record is clear Defendants did not make any defamatory statement to Plaintiff's mother Irene Fokas and Irene Fokas merely "assumed" and "figured" the source of the alleged defamatory statements was Defendants. Irene Fokas attested in both an affidavit and in her deposition that neither the Defendants (nor anyone in Defendants' family) has ever told her the alleged defamatory statement(s) alleged by Plaintiff. Irene Fokas further testified in her deposition she never asked her daughter who the source of these alleged defamatory statements was, but instead, Irene Fokas merely "guessed" and "figured" that the source of the alleged defamatory statements was Defendants. As such, Irene Fokas' speculation is not evidence of any defamation by Defendants.

**c. Stan Barnett, Plaintiff's Attorney**

No genuine issue of material fact exists and there is not a scintilla of evidence to support publication of any alleged defamatory statement(s) by Defendants to any third party, including any alleged statements to Plaintiff's attorney Stan Barnett. Further, the record is clear that any alleged defamatory statement(s) about Plaintiff by Defendants to Plaintiff's attorney Stan Barnett does not support a claim of defamation as a matter of law.

First, an action for defamation requires publication of an unprivileged defamatory statement to a third party. Plaintiff's attorney Stan Barnett is Plaintiff's agent and does not constitute a third party. See Rodgers v. Wise, 193 S.C. 5, 7 S.E.2d 517 (1940) ("We are satisfied that the sounder and better supported rules are, first, that communications made to a libeled party's attorneys, corresponding for him regarding the specific matter in connection with which the libelous matter is used, are not thereby given publication; ..."); see also Koutsogiannis v. BB&T, 365 S.C. 145, 149, 616 S.E.2d 425, 428 (2005) (stating attorneys engaged in settlement negotiations within the scope of their representation of a party serve as agents for their clients).[5]

Second, and in the alternative, any alleged defamatory statement(s) allegedly published by Defendants to Plaintiff's attorney Stan Barnett is absolutely privileged and, thus, cannot serve as the basis for a defamation action as a matter of law. In South Carolina, "the absolute privilege exists as to any utterance arising out of the judicial proceeding and having any reasonable relation to it, including preliminary steps leading to judicial action of any official nature provided those steps bear reasonable relation to it." Crowell v. Herring, 301 S.C. 424, 430, 392 S.E.2d 464, 467 (Ct. App. 1990). When a communication is absolutely privileged, no action lies for its publication, no matter what the circumstances under which it is published, i.e., an action will not lie even if the report is made with malice." Pond Palace Partners, Inc. vs. Poole, 351 S.C. 1, 22, 567 S.E.2d 881, 892 (Ct. App. 2002).

[5] Furthermore, "[s]elf-publication of [an] allegedly defamatory statement may bar a plaintiff from recovery." Murray v. Holnam, Inc., 344 S.C. 129, 144-45, 542 S.E.2d 743, 751 (2001); David P. Chapus, Annotation, Publication of Allegedly Defamatory Matter by Plaintiff ("Self-Publication") As Sufficient to Support Defamation Action, 62 A.L.R.4th 616 (1988); see also 50 Am.Jur. 2d Libel and Slander § 241 (1995) (as a general rule, where a person communicates a defamatory statement only to person defamed and defamed person then repeats statement to others, publication of statement by person defamed, or "self-publication," will not support defamation action against originator of statements). "There is no publication where a Defendant communicates a statement directly to the Plaintiff, who then communicates it to a third party." Restatement of Torts 2d § 577, Comment m (1971).

The record is undisputed, and I hereby find, that Plaintiff's attorney Stan Barnett sent a letter on behalf of Plaintiff to Defendants threatening litigation for numerous causes of actions and damages and Stan Barnett requested Defendants meet with him "to try and work out a way forward" "so that any further conflict can be avoided." Defendant Spiros Ferderigos replied to Mr. Barnett welcoming a "conversation of resolving these issues" in the threatened lawsuit by Plaintiff because any such lawsuit by Plaintiff would be frivolous and would further result in countersuits against Plaintiff with numerous causes of action and well documented liability against Plaintiff for his behavior. Indeed, Plaintiff acknowledges in his memorandum to the Court that Plaintiff "retained Stan Barnett to communicate to Defendants that they were in breach of contract," and Mr. Barnett met with Defendants "to discuss whether there was a way for them to negotiate a way with Plaintiff to move forward...".

It was within the context of this private settlement negotiation meeting at the request of Plaintiff's counsel that Plaintiff alleges Defendants defamed Plaintiff to Plaintiff's attorney. Stan Barnett was an agent of Plaintiff and not a third party. This meeting requested by Plaintiff through his attorney Stan Barnett was a preliminary step leading to judicial action of an official nature and the meeting bears reasonable relationship to it. Plaintiff threatened litigation against Defendants and requested a meeting to try and resolve the issues to avoid further conflict. In agreeing to meet with Plaintiff's attorney Stan Barnett to discuss resolving the threats of litigation, Defendants further informed Plaintiff's counsel in writing there would be numerous counterclaims and well-documented liability against Plaintiff if Plaintiff filed a lawsuit against them. Additionally, the negotiations failed and the parties filed formal judicial proceedings against each other as was threatened by the parties in the aforementioned communications regarding the meeting. I find any alleged defamatory statement(s) that were allegedly made by Defendants against Plaintiff to

Plaintiff's attorney in this preliminary step (settlement/negotiation meeting) leading to formal judicial proceedings are absolutely privileged and, therefore, do not support a claim of defamation as a matter of law.[6]

Third, and in the alternative, any allegedly defamatory statements about Plaintiff allegedly published to Mr. Barnett do not constitute publication as they were invited by Plaintiff's agent, Mr. Barnett. It has long been settled in South Carolina that "a person cannot invite or provoke another to make a slanderous charge against him, and then sue such person for damages on account of such charge." Boling v. Clinton Cotton Mills, 163 S.C. 13, 163 S.E. 195, 199 (1931). "There is no such publication as will support an action where the defamatory matter is invited or procured by the plaintiff or by person acting for him in the matter." Id. "If the only publication that can be provided is one made by the defendant in answer to an application from the plaintiff, or some agent of the plaintiff, demanding explanation, such answer, if fair and relevant will be held privileged; for the plaintiff brought it on himself." Id. Attorneys engaged in settlement negotiations within the scope of their representation of a party serve as agents for their clients. See Koutsogiannis v. BB&T, 365 S.C. 145, 149, 616 S.E.2d 425, 428 (2005). As set forth herein and in the record, Plaintiff, through his agent, cannot invite Defendants to meet and discuss how to resolve the issues between them and then allege Defendants defamed him by discussing those issues. I further find that any statements made during the private settlement negotiations held at Plaintiff's request do not support a claim of defamation in this matter.

I further find that no genuine issue of material fact exists and there is not a scintilla of evidence to support publication of any alleged defamatory statement(s) by Defendants to any third party through circumstantial evidence. Additionally, there were numerous individuals who were

[6] Additionally, and in the alternative, as the attorney for Plaintiff, Mr. Barnett's communications with Defendants were part of settlement negotiations and are inadmissible to prove liability pursuant to Rule 408, SCRE.

aware of the alleged rumored incidents besides Defendants, and any one of those people could have been responsible for the rumors alleged in Plaintiff's defamation claims. The alleged rumors could not be said to have only been possibly attributable to each Defendant.[7]

## E. CONCLUSION

For the foregoing reasons, I hereby grant Defendants' Motion for Summary Judgment in this matter.

J. C. Nicholson, Jr., Judge
S.C. Circuit Court, Ninth Judicial Circuit

2/16/12

[7] See Williams v. Lancaster County School Dist., 369 S.C. 293, 298-99, 631 S.E.2d 286, 289-90 (2006), "Based on the evidence of record, there were numerous individuals who were aware of the bathroom incident besides Dr. Jordan. Any one of those people could have been responsible for the rumor of an illicit relationship between Philip and Cheryl. The record simply does not support the Williamses' assertion that the only individuals who had knowledge of the incident were Dr. Jordan and John Hardin. Further the Williamses have conceded that John Hardin had knowledge of the incident. Thus, the rumors cannot be said to have only been possibly attributable to Dr. Jordan, and the Williamses' argument concerning indirect evidence fails."